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In the Supreme Court of the United States

OCTOBER TERM, 1978

GRIFFIN B. BELL, ET AL., PETITIONERS

v.

LOUIS WOLFISH, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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I.

Respondents essentially adopt the reasoning of the court of appeals, arguing that because pretrial detainees retain a presumption of innocence and may not be subjected to punishment before being convicted, due process requires the government to justify restrictions placed on them—such as double-celling in rooms originally designed to house one person—by a "compelling necessity." They contend that administrative and fiscal requirements may thus not be considered in evaluating the constitutionality of condi-

tions of pretrial confinement. Further, while recognizing that the needs of institutional security may justify restrictive practices, respondents maintain that the court of appeals was correct in holding that the several challenged practices at the Metropolitan Correctional Center (MCC) are not justified by legitimate security considerations and thus constitute unreasonable restrictions on both convicted inmates and pretrial detainees. For reasons set forth in our opening brief, we believe those arguments to be incorrect. Several matters in respondents' brief, however, warrant additional comment.

1. Respondents claim (Resp. Br. 37, 38-39) that the due process standard employed by the court of appeals is not a broad test requiring the government to show a compelling necessity for every restriction imposed on pretrial detainees, but is instead a very selective standard that applies only when a "substantial" right is being infringed. In illustration of the claimed limited applicability of the court's compelling necessity standard, respondents note that the court of appeals reversed the district court's action with regard to several "insubstantial" deprivations, such as the ban on personal typewriters, the required wearing of uniforms, and the restricted access to visiting room bathrooms (*Id.* at 39).

Respondents' characterization of the decision below finds no support in the court's articulation of its due process standard, nor in its explanation of specific applications of the standard. The court was emphatic in its statement of the breadth of its constitutional holding (Pet. App. 11a-12a; citations omitted):

> Time and again, we have stated without equivocation the indisputable rudiments of due process: pretrial detainees may be subjected to only those "restrictions and privations" which "inhere in their confinement itself or which are justified by compelling necessities of jail administration.

The court did not suggest that its due process standard applies only to rights deemed "substantial;" to the contrary, the court indicated without qualification that the standard is designed to protect for pretrial detainees "the rights afforded unincarcerated individuals" (Pet. App. 11a).

To be sure, as we noted in our brief (Br. 40 n.32), the court of appeals seemingly did not consistently apply its due process reasoning in review of various challenged practices. In those instances where the compelling necessity standard was clearly applied, however, the court failed first to determine the nature of the constitutional interest affected by the governmental restriction before determining the appropriate standard of governmental justifications. Thus, for example, while the court banned doublecelling because it said the government had failed to show a compelling necessity for "the substantial abrogation of personal privacy," it never discussed the nature of the "right to privacy" here involved or made any specific finding that the right was sufficiently "substantial" to be deserving of the special protection afforded by the "compelling necessity" standard (Pet. App. 17a-19a; see Br. 46-47). Nor did the court ever attempt to formulate any guide-

lines for identifying those rights that should be considered "substantial."

There is thus no basis for respondents' claim that the standard employed by the court in this case is one of very limited and selective application, reserved for only a certain undefined category of "substantial" rights.

Moreover, as is discussed in detail in our brief (Br. 28-35) there is no basis in the decisions of this Court for any conclusion that the government must show a "compelling necessity" to infringe "substantial," but not fundamental, personal liberties. The decision of the court of appeals is not made defensible merely by asserting that substantial or important personal interests are affected by the challenged government action. See *id.* at 28-32.

2. In support of the district court's conclusion, on a motion for summary judgment, that double-celling in the residential rooms at the MCC was unconstitutional, respondents refer to the "uncontradicted" statement of the MCC architect that the rooms were specifically planned and designed to house one person and that double-celling would be a " 'clear and apparent violation of capacity * * *' " (Resp. Br. 11, 40).

Initially, it should be made clear that this "uncontradicted sworn statement" was not part of the trial testimony in this case. Instead, it was an excerpt from testimony given in a different proceeding not involving these parties. It was submitted in this case as part of respondents' affidavit in support of their motion for summary judgment (A. 9). Quite apart

from the question whether this unexamined testimony may be relied on by the district court in disposing of a motion for summary judgment (see Pet. App. 205a-206a n.5), it remains our position that the issue of double-bunking was not a proper subject for summary judgment in this case (Br. 49-54) and that the architect's opinion does not constitute an adequate basis for finding a due process violation. Institutional design is only one factor to be considered in determining whether a constitutional violation has occurred, since "[t]hose who design prisons are not vested with either the duty or the power to prescribe constitutional standards as to prison space." *Newman* v. *Alabama*, 559 F.2d 283, 288 (5th Cir. 1977). As is discussed in detail in our brief (Br. 44-46, 49), several other factors relating to the reasonableness and constitutionality of double-celling in the particular context of the MCC remained unexamined by the courts below.[1]

Respondents contend (Resp. Br. 48-50), however, that the government cannot argue that considerations of cost and administrative inconvenience justify double-celling at the MCC because, since the date of the district court's order, the administrators have been able to comply with a single-cell requirement.

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[1] Respondents also seek to rely on other cases involving minimum space requirements for different institutions (Resp. Br. 41 n.40). As we have noted, however, this ignores the fact that conditions at the MCC, with its modular unit design, differ markedly from those in other institutions (Br. 52-53). The error of the district court was precisely that of relying on evidence concerning these different factual situations and failing to conduct a particularized inquiry at the MCC.

This argument is wholly insubstantial for several reasons. First, it has, in large part, been possible to eliminate double-celling at the MCC because the number of persons committed to the Bureau's custody for housing at that facility has significantly diminished. The planned capacity of the MCC at the time it opened was 449 inmates (Pet. App. 6a). At the time of the district court's ruling enjoining double-celling at the MCC, on January 19, 1977 (A. 3), there were, according to the records of the Bureau of Prisons, 535 inmates at the MCC, including 298 pretrial detainees. On January 5, 1979, by contrast, there were only 417 inmates, of which only 163 were pretrial detainees. This substantial reduction in the number of pretrial detainees committed to the Bureau's custody in the New York Metropolitan area has made it feasible at present to forego double-celling. But this says nothing about the feasibility of eliminating double-celling if, as is entirely possible, the number of detainees were again to increase to higher levels.

The second flaw in respondents' argument is apparent from its face. The argument is based on the unrealistic assumption that since it is *possible* to comply with a single-celling order, no administrative difficulties or additional expenses are encountered in doing so. Moreover, respondents overlook the fact that the government was precluded from offering evidence of administrative and fiscal requirements by the district court's award of summary judgment and the court of appeals' express refusal to consider

these governmental interests in its constitutional analysis (Pet. App. 12a). In our brief (Br. 49-50), we have pointed to some of the factual elements of administrative necessity and fiscal concern that should properly be considered in determining the constitutionality of double-celling at the MCC. These issues should properly be explored on remand, rather than in this Court, since the rulings below have forestalled their development in this record.

3. Respondents also assert (Resp. Br. 59 & n. 60) that the government failed to offer any evidence to show that visual body cavity inspections following contact visits are of any actual utility in preventing or discovering the smuggling of contraband into the facility. Respondents note that expert testimony quoted in our brief (Br. 72 n.54) states that secretion of contraband in the rectum is not only feasible but has been known to occur. They claim, however, that this testimony, "when read in full, does not support the government's position" (Resp. Br. 59 n.60).

When the testimony in question is read in its context, it is apparent that it establishes the institutional need for this search procedure. In the course of discussing the procedure employed for visual inspection of body cavities, the witness was asked by the district court whether "a fully-dressed inmate in a visiting room could feasibly or with any frequency secrete contraband in the rec[t]um" (A. 71). He responded: "Absolutely. I know of cases where it

has happened" (*ibid.*).[2] He then went on to say: "It does not stop, your Honor, and would not stop somebody swallowing something, whether it passed in a balloon and swallowed something in a balloon and then passing it later, when they get back in the unit" (*ibid.*). In so stating, the witness was not contradicting what he had just said—that the government's concern about the possibility of contraband being secreted in body cavities was not imagined but was based on past experience. Instead, he was referring to his ongoing testimony concerning the body cavity inspection procedure and explaining that there are ways of circumventing even this relatively thorough form of inspection. As the witness later stated expressly (A. 72), the contraband problem is serious enough that even the most drastic preventive measures are not always completely effective. Far from suggesting that such search procedures are useless, the witness described additional measures that could be employed to help stem the problem of smuggled contraband, including restrictions on visiting for persons found to have smuggled contraband into a facility with the help of a visitor (A. 71-72). Viewing this testimony in its proper context, it is apparent that the witness was expressing the reality of the

[2] This testimony also demonstrates that, contrary to respondents' assertion (Resp. Br. 58), the record does not contain "uncontradicted expert testimony" that the one-piece uniforms worn by MCC inmates make it impossible for them to conceal contraband in the vaginal or anal cavity. Indeed, the district court agreed that, though difficult, this method of concealment was possible (Br. 72 n.54).

government's security concern and the need for preventive measures, including the visual body cavity inspection. Additional substantial evidence demonstrating the need for this inspection procedure is discussed in our opening brief (Br. 70-73).

4. Respondents argue (Resp. Br. 67-68) that, in light of recent and proposed changes in the "publisher only" rule by the Bureau of Prisons (see Br. 66 n.49), this Court should dismiss the writ of certiorari as improvidently granted to the extent that it seeks review of the order enjoining further application of the "publisher only" rule at the MCC. This argument, however, is not substantial. Unlike the situation in *Sanks* v. *Georgia*, 401 U.S. 144 (1971), on which respondents rely (Resp. Br. 68), the Bureau of Prisons has not substituted an entirely different regulatory scheme and wholly abandoned the requirements that were invalidated below. The fact that the government no longer challenges the order of the district court as applied to soft-covered materials (Resp. Br. 68) does not detract from the significance of the institutional security interest in limiting entry of hard-covered materials from private sources (Br. 66, 68-69 & n.51). The government has simply chosen to limit its disagreement to that aspect of the district court's order that occasions greatest concern—an option that would be available even if the agency did not propose voluntarily to modify its rule.[3]

[3] We noted in our brief that the "publisher only" rule has been amended to allow receipt of materials transmitted to the

II.

In a brief filed by the NAACP Legal Defense and Educational Fund, Inc. (the "Fund"), as *amicus curiae*, two additional arguments in support of the court of appeals decision have been advanced. They contend (1) that federal courts have inherent authority to correct the conditions of pretrial detention because persons awaiting trial remain within the courts' continuing jurisdiction and (2) that to the extent the practices at issue in this case are inconsistent with the Draft Federal Standards for Corrections, they violate the Attorney General's determination of the "suitable quarters" to be afforded inmates under 18 U.S.C. 4042(2). These claims have not been raised in the courts below in this case nor, so far as we are aware, in any other case. Nor have they been raised or briefed by either party in this Court. They therefore need not be considered by this Court. In any event, the arguments lack merit.

MCC from bookstores as well as from publishers (Br. 66 n.49). Respondents' claim (Resp. Br. 69) that the change demonstrates that "even as to hard-cover books, the security risk is not compelling." While there may be some increase in the risk of contraband being introduced whenever additional sources are allowed, this modification in the security practice merely reflects the judgment of the Bureau that, as in the case of books mailed directly from publishers, books mailed from bookstores are far less likely to contain contraband then books mailed from private sources. This limited extension of permitted sources does not negate the government's basic concern that hard-cover books are particularly serviceable for the concealment of contraband and extremely difficult to search effectively.

1. The Fund maintains that the federal courts have inherent power to correct conditions of confinement for detainees because those charged with crime remain within the jurisdiction of the court (Am. Br. 22-37). It claims that since federal courts have the power to admit an accused to bail and to set conditions on the granting of bail, courts necessarily have the power to specify appropriate conditions of confinement for persons who are not released on bail. The Fund argues that this power may be exercised in a *habeas corpus* proceeding pursuant to the court's authority to "dispose of the matter as law and justice requires" (*id.* at 37, quoting 28 U.S.C. 2243).

The argument advanced by the Fund has substantial flaws:

(a) Nowhere does the brief identify the source of the courts' inherent authority to determine suitable conditions of confinement for persons not released on bail. It may, at the least, be doubted whether an administrative authority over pretrial commitment could properly be delegated to or assumed by the Judicial Branch consistent with Article III of the Constitution. The Fund suggests, however, that the courts' "inherent authority" over confinement conditions emanates from its power to grant bail and "from the authority of the court over the person within its jurisdiction" (Br. 29). The authority to which the Fund refers—the power to grant bail—has been comprehensively organized by Congress in the Bail Reform Act of 1966, 18 U.S.C. 3041 *et seq.* There is nothing in that Act establishing any

judicial authority over confinement conditions. Instead, the Act directs the court, in situations where release is not granted under conditions specified by the Act (*e.g.*, 18 U.S.C. 3146, 3148), to imprison the defendant for trial (18 U.S.C. 3041). Where imprisonment for trial is ordered, 18 U.S.C. 4042 specifies that "[t]he Bureau of Prisons, under the direction of the Attorney General, shall * * * (2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with * * * offenses against the United States * * *." Thus, even if some "inherent authority" to administer jails imaginably once existed, it has been displaced by a congressional delegation of this very power to an executive agency. Cf. *United States* v. *New York Telephone Co.*, 434 U.S. 159, 172-173 (1977); *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 273 (1942).

(b) The claimed inherent judicial authority to mandate suitable conditions of pretrial confinement would lead to absurd results. Since it is basic to the Fund's contention that this inherent authority is not dependent on a finding that conditions of pretrial confinement are unconstitutional (Am. Br. 24), each individual committing judge or magistrate could require in each individual case those conditions of confinement that he or she regards as suitable. Not only could each judge or magistrate differ as to what constitutes appropriate conditions, but each judge or magistrate could impose different confinement conditions for different detainees. The complete absence

of any uniform standards under such a regime would, as a practical matter, make institutional confinement impossible. The assertion of inherent power by each committing judge or magistrate would produce a chaos of varying requirements that would make uniform administration infeasible.[4]

c. Even if the claimed inherent judicial authority to specify conditions of confinement were thought to exist, it could not be exercised in a class action habeas corpus proceeding such as this case. When conditions of confinement are challenged by means of a petition for a writ of habeas corpus, as in the present case, the court has power to grant relief only if it can be shown that a person "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. 2241(c)(3). See *Davis* v. *United States*, 417 U.S. 333, 344 (1974). It would not suffice for a court to find that some condition of confinement seemed unreasonable or unwise, absent some violation of a statutory or constitutional right.

If the authority could be exercised at all, it would, by the Fund's own hypothesis, have to be pursuant to a motion directed to the committing judge or magistrate to grant or alter bail or release conditions. Such a motion is plainly not amenable to class action treatment of the type involved in this case, since not every inmate at a pretrial facility will have

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[4] For example, some committing judges could insist that detainees be housed one to a cell, while others could require that detainees be housed at the MCC rather than at other, more distant facilities. Compliance with both requirements might prove impossible.

been ordered to custody by the same judge (or, in the case of the MCC, not even by judges within the same district court or even within any single federal circuit).

In short, this argument is devoid of any practical or logical merit.

2. The Fund claims that, by issuing the Draft Federal Corrections Standards for comment (see Br. 54 n.43), the Attorney General "has already expressed his expert determination" under 18 U.S.C. 4042(2) as to the "suitable quarters" that must be afforded to pretrial detainees (Am. Br. 46). It argues that these "standards specifically prohibit the practices at issue in this case" (*id.* at 41).

The Fund is in error as to each of its contentions. By issuing the Draft Standards for public comment, the Attorney General has not promulgated them as regulations with the force of law and is not bound by them. *Sullivan* v. *United States*, 348 U.S. 170, 173 (1954). Moreover, even if the Draft Standards were hereafter to be formally adopted by the Attorney General, they expressly state that they embody liberal administrative goals only and do not intend to confer any rights or legal cause of action on any individuals (Br. 54-55 n.43). They thus provide no basis for judicial enforcement of private claims. See *Cort* v. *Ash*, 422 U.S. 66, 78 (1975); *United States* v. *Mapp*, 561 F.2d 685, 690 (7th Cir. 1977); *United States* v. *Lockyer*, 448 F.2d 417, 421 (10th Cir. 1971). Finally, the institutional practices for which review is sought in this case are either consistent

with the proposed administrative goals set forth in the Draft Standards (Br. 54-55 n.43, 76 n.58), are not discussed under the Draft Standards (*i.e.*, room search procedures), or remain under study by the Bureau and the Attorney General.

CONCLUSION

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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